

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

CAPITOL RECORDS, LLC, *et al*,

Plaintiffs,

v.

MP3TUNES, LLC, and MICHAEL ROBERTSON,

Defendants.

No. 07 Civ. 9931 (WHP)(FM)

MP3TUNES, LLC, and MICHAEL ROBERTSON,

Counter-Claimant,

v.

CAPITOL RECORDS, LLC, *et al*,

Counter-Defendants.

**DECLARATION OF ANDREW H. BART IN SUPPORT OF
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

Andrew H. Bart declares, pursuant to 28 U.S.C. § 1746, as follows:

1. I am a partner in the law firm of Jenner & Block LLP, counsel for the EMI Label Plaintiffs.¹ I submit this declaration on behalf of all Plaintiffs in this action, to place before the Court documents and testimony relevant to Plaintiffs' motion for summary judgment in support of Plaintiffs' motion for summary judgment against defendant MP3tunes LLC ("MP3tunes").

¹ The EMI Label Plaintiffs are Capitol Records, Inc.; Caroline Records, Inc.; EMI Christian Music Group Inc.; Priority Records LLC; and Virgin Records America, Inc.

RELEVANT DOCUMENTS AND DEPOSITION TRANSCRIPTS

2. A true and correct copy of the Defendant's Answer to the Second Amended Complaint in this action, dated December 7, 2009 (the "Answer") is attached hereto as Exhibit 1.

3. A true and correct copy of excerpts of Michael Robertson's deposition testimony on April 9, 2008 is attached hereto as Exhibit 2.

4. A true and correct copy of excerpts of Michael Robertson's deposition testimony on June 10, 2009 is attached hereto as Exhibit 3.

5. A true and correct copy of excerpts of Michael Robertson's deposition testimony on January 28 and January 29, 2010 is attached hereto as Exhibit 4.

6. A true and correct copy of excerpts of Doug Reese's deposition testimony on January 25, January 26, January 27 and March 25, 2010 is attached hereto as Exhibit 5.

7. A true and correct copy of excerpts of Cody Brocious' deposition testimony on December 9, 2009 is attached hereto as Exhibit 6.

8. A true and correct copy of excerpts of Kevin Carmony's deposition testimony on April 9, 2008 is attached hereto as Exhibit 7.

9. A true and correct copy of excerpts of Kendall Dawson's deposition testimony on January 22, 2010 is attached hereto as Exhibit 8.

10. A true and correct copy of excerpts of Lewis Goodwin's deposition testimony on March 24, 2010 is attached hereto as Exhibit 9.

11. A true and correct copy of excerpts of Julian Krause's deposition testimony on March 13, 2010 is attached hereto as Exhibit 10.

12. A true and correct copy of excerpt of Sharmaine Lindahl's deposition testimony on March 31, 2010 is attached hereto as Exhibit 11.

13. A true and correct copy of excerpts of Emily Richards' deposition testimony on June 30, 2009 is attached hereto as Exhibit 12.

14. A true and correct copy of excerpts of Robert Ruth's deposition testimony on March 26, 2010 is attached hereto as Exhibit 13.

15. A true and correct copy of excerpts of Camille Wood's deposition testimony on January 15, 2010 is attached hereto as Exhibit 14.

16. A true and correct copy of excerpts of Doug Reese's deposition testimony on April 8, 2008 is attached hereto as Exhibit 15.

17. A true and correct copy of an email dated June 29, 2006 from Michael Robertson to Sharmaine Lindahl and MP3tunes employees, introduced as an exhibit at the January 26, 2010 deposition of Doug Reese is attached hereto as Exhibit 16.

18. A true and correct copy of an email dated June 11, 2008 from Michael Robertson to MP3tunes employees, introduced as an exhibit at the March 31, 2010 deposition of Sharmaine Lindahl, regarding marketing the Sideload Website is attached hereto as Exhibit 17.

19. A true and correct copy of an email dated January 31, 2006 from Michael Robertson to MP3tunes employees, introduced as an exhibit at the January 28, 2010 deposition of Michael Robertson, is attached hereto as Exhibit 18.

20. A true and correct copy of the results of a query of MP3tunes' "User Locker Files" table in its "User Locker" database, introduced as an exhibit at the January 25, 2010 deposition of Doug Reese, is attached hereto as Exhibit 19.

21. A true and correct copy of the results of a query of MP3tunes' databases regarding a specific file embodying the sound recording "Speed of Sound" by the EMI Label

artist Coldplay, introduced as an exhibit at the January 25, 2010 deposition of Doug Reese, is attached hereto as Exhibit 20.

22. A true and correct copy of the results of a query of MP3tunes' database regarding instances that a specific file was played from the MP3tunes Website, introduced as an exhibit at the January 25, 2010 deposition of Doug Reese, is attached hereto as Exhibit 21.

23. A true and correct copy of an email dated October 2, 2006 from Doug Reese to MP3tunes employees, introduced as an exhibit at the January 26, 2010 deposition of Doug Reese, is attached hereto as Exhibit 22.

24. A true and correct copy of a print-out of computer code relating to album art, introduced as an exhibit at the January 26, 2010 deposition of Doug Reese, is attached hereto as Exhibit 23.

25. A true and correct copy of a letter dated September 4, 2007 from Jenner & Block LLP to MP3tunes, introduced as an exhibit at the January 25, 2010 deposition of Doug Reese, is attached hereto as Exhibit 24.

26. A true and correct copy of a letter dated October 25, 2007 from Jenner & Block LLP to MP3tunes, introduced as an exhibit at the January 25, 2010 deposition of Doug Reese, is attached hereto as Exhibit 25.

27. A true and correct copy of a letter dated October 25, 2007 from Jenner & Block LLP to MP3tunes, introduced as an exhibit at the January 27, 2010 deposition of Doug Reese, is attached hereto as Exhibit 26.

28. A true and correct copy of an email dated June 28, 2006 from Dan Carter to Emily Richards is attached hereto as Exhibit 27.

29. A true and correct copy of an email dated August 29, 2007 from Dorothy Sherman to Emily Richards, introduced as an exhibit at the April 9, 2008 deposition of Michael Robertson, is attached hereto as Exhibit 28.

30. A true and correct copy of an MP3tunes customer service communication labeled Tcktid 511, introduced as an exhibit at the March 31, 2010 deposition of Sharmaine Lindahl, is attached hereto as Exhibit 29.

31. A true and correct copy of an MP3tunes customer service communication labeled Tcktid 634, introduced as an exhibit at the March 31, 2010 deposition of Sharmaine Lindahl, is attached hereto as Exhibit 30.

32. A true and correct copy of an MP3tunes customer service communication labeled Tcktid 3120, introduced as an exhibit at the March 31, 2010 deposition of Sharmaine Lindahl, is attached hereto as Exhibit 31.

33. A true and correct copy of an MP3tunes customer service communication labeled Tcktid 466 is attached hereto as Exhibit 32.

34. A true and correct copy of an email dated December 12, 2007 from Julian Krause to Emily Richards, Michael Robertson, and Doug Reese, introduced as an exhibit at the March 13, 2010 deposition of Julian Krause, is attached hereto as Exhibit 33.

35. A true and correct copy of an MP3tunes customer service communication labeled Tcktid 7728 is attached hereto as Exhibit 34.

36. A true and correct copy of an MP3tunes customer service communication labeled Tcktid 1382 is attached hereto as Exhibit 35.

37. A true and correct copy of an MP3tunes customer service communication labeled Tcktid 634 is attached hereto as Exhibit 36.

38. A true and correct copy of an MP3tunes customer service communication labeled Tcktid 2195 is attached hereto as Exhibit 37.

39. A true and correct copy of an MP3tunes customer service communication labeled Tcktid 2224 is attached hereto as Exhibit 38.

40. A true and correct copy of an MP3tunes customer service communication labeled Tcktid 3120 is attached hereto as Exhibit 39.

41. A true and correct copy of an MP3tunes customer service communication labeled Tcktid 7802 is attached hereto as Exhibit 40.

42. A true and correct copy of an MP3tunes customer service communication labeled Tcktid 9083 is attached hereto as Exhibit 41.

43. A true and correct copy of an MP3tunes customer service communication labeled Tcktid 9087 and Tcktid 9125 is attached hereto as Exhibit 42.

44. A true and correct copy of an MP3tunes customer service communication labeled Tcktid 9825 is attached hereto as Exhibit 43.

45. A true and correct copy of a print-out of the website located at the URL <http://web.archive.org/web/20071111170155/http://www.myfilestash.com/> is attached hereto as Exhibit 44.

46. A true and correct copy of a print-out of the website located at the URL <http://fileden.com/> is attached hereto as Exhibit 45.

47. A true and correct copy of an MP3tunes customer service communication labeled Tcktid 754 is attached hereto as Exhibit 46.

48. A true and correct copy of a print-out of the website located at the URL <http://immondice.free.fr/index.php> is attached hereto as Exhibit 47.

49. A true and correct copy of a print-out of the website located at the URL http://66.163.168.225/babelfish/translate_url_content?.intl=us&lp=fr_en&trurl=http%3A... is attached hereto as Exhibit 48.

50. A true and correct copy of a print-out of the website located at the URL <http://web.tiscali.it/ytnsovlvrp/> is attached hereto as Exhibit 49.

51. A true and correct copy of a print-out of the website located at the URL <http://engr.oregonstate.edu/> is attached hereto as Exhibit 50.

52. A true and correct copy of a print-out of the website located at the URL <http://onlinestoragesolution.com/> is attached hereto as Exhibit 51.

53. A true and correct copy of a print-out of the website located at the URL <http://www.exarchive.com/content/> is attached hereto as Exhibit 52.

54. A true and correct copy of a print-out of the website located at the URL <http://homepage.mac.com/rfwilmut/notes/idisk.html> is attached hereto as Exhibit 53.

55. A true and correct copy of a print-out of the website located at the URL <http://nk1lr10-homepage.mac.com/WebObjects/FileSharing.woa/wa/default?user=backtot...> is attached hereto as Exhibit 54.

56. A true and correct copy of an email dated November 27, 2005 from Michael Robertson to Dave Uosikkinen, Emily Richards and Sharmaine Lindahl is attached hereto as Exhibit 55.

57. A true and correct copy of an email dated March 8, 2006 from Michael Robertson to Doug Reese, Emily Richards, and Dave Uosikkinen, introduced as an exhibit at the January 26, 2010 deposition of Doug Reese, is attached hereto as Exhibit 56.

58. A true and correct copy of an email dated November 21, 2005 from Sharmaine Lindahl to Michael Robertson, Emily Richards and MP3tunes employees is attached hereto as Exhibit 57.

59. A true and correct copy of an email dated November 22, 2005 from Sharmaine Lindahl to Michael Robertson, Emily Richards, and MP3tunes employees is attached hereto as Exhibit 58.

60. A true and correct copy of an email dated January 29, 2006 from Emily Richards to MP3tunes employees, introduced as an exhibit at the January 28, 2010 deposition of Michael Robertson, is attached hereto as Exhibit 59.

61. A true and correct copy of an email dated January 29, 2006 from Emily Richards to MP3tunes employees, introduced as an exhibit at the January 26, 2010 deposition of Doug Reese, is attached hereto as Exhibit 60.

62. A true and correct copy of an email dated August 26, 2006 from Martin Bartlett to Doug Reese, introduced as an exhibit at the January 26, 2010 deposition of Doug Reese, is attached hereto as Exhibit 61.

63. A true and correct copy of an email dated December 8, 2007 from Doug Reese to MP3tunes employees, introduced as an exhibit at the January 26, 2010 deposition of Doug Reese, is attached hereto as Exhibit 62.

64. A true and correct copy of an email dated February 9, 2006 from Emily Richards to MP3tunes employees, introduced as an exhibit at the January 27, 2010 deposition of Doug Reese, is attached hereto as Exhibit 63.

65. A true and correct copy of an email dated April 10, 2006 from Doug Reese to Jeff Mastropietro, Clint Rosander, and Mark Wooton, introduced as an exhibit at the January 26, 2010 deposition of Doug Reese, is attached hereto as Exhibit 64.

66. A true and correct copy of an email dated February 28, 2006 from Doug Reese to Emily Richards and Clint Rosander, introduced as an exhibit at the January 27, 2010 deposition of Doug Reese, is annexed hereto as Exhibit 65.

67. A true and correct copy of an email dated February 9, 2006 from Doug Reese to MP3tunes employees, introduced as an exhibit at the January 27, 2010 deposition of Doug Reese, is attached hereto as Exhibit 66.

68. A true and correct copy of an MP3tunes customer service communication labeled Tcktid 769 is attached hereto as Exhibit 67.

69. A true and correct copy of an MP3tunes customer service communication labeled Tcktid 8865 is attached hereto as Exhibit 68.

70. A true and correct copy of an MP3tunes customer service communication labeled Tcktid 3532 is attached hereto as Exhibit 69.

71. A true and correct copy of an MP3tunes customer service communication labeled Tcktid 3112 is attached hereto as Exhibit 70.

72. A true and correct copy of an MP3tunes customer service communication labeled Tcktid 6490 is attached hereto as Exhibit 71.

73. A true and correct copy of an MP3tunes customer service communication labeled Tcktid 9354 is attached hereto as Exhibit 72.

74. A true and correct copy of the MP3tunes Terms of Use printed from http://www.MP3tunes.com/cb/terms_conditions/ is attached hereto as Exhibit 73.

75. A true and correct copy of an email from Doug Reese to MP3tunes dated January 17, 2007 from Doug Reese to MP3tunes employees, introduced as an exhibit at the January 27, 2010 deposition of Doug Reese, is attached hereto as Exhibit 74.

76. A true and correct copy of an email dated May 16, 2007 from Michael Robertson to John Parres, introduced as an exhibit at the January 29, 2010 deposition of Michael Robertson, is attached hereto as Exhibit 75.

77. A true and correct copy of an email dated August 4, 2007 from Doug Reese to Michael Robertson and MP3tunes employees is attached hereto as Exhibit 76.

78. A true and correct copy of an email dated June 29, 2006 from Michael Robertson to MP3tunes employees, introduced as an exhibit at the March 31, 2010 deposition of Sharmaine Lindahl, is attached hereto as Exhibit 77.

79. A true and correct copy of an email dated August 16, 2005 from Michael Robertson to Doug Reese, Cody Brocious, and team@MP3tunes.com, introduced as an exhibit at the January 26, 2010 deposition of Doug Reese, is attached hereto as Exhibit 78.

80. A true and correct copy of a print-out of the website located at the URL <http://www.filelodge.com/> is attached hereto as Exhibit 79.

81. A true and correct copy of a print-out of the website located at the URL <https://www.yousendit.com/> is attached hereto as Exhibit 80.

82. A true and correct copy of a print-out of the website located at the URL <http://rapidshare.com/> is attached hereto as Exhibit 81.

83. A true and correct copy of a screen capture of the website at the URL http://emichrysalis.co.uk/herculesandloveaffair/downloads/16_11_07/, introduced as an exhibit at the March 25, 2010 deposition of Doug Reese, is attached hereto as Exhibit 82.

84. A true and correct copy of an email dated January 10, 2007 from Alison Perks to Matt Cook, Dan Cohen, Bob Heineman and Hannah@cmomanagement.co.uk is attached hereto as Exhibit 83.

85. A true and correct copy of a screen capture of the website at the URL <http://decemberists.artistaging.com/freedownload/therakessong.html> is attached hereto as Exhibit 84.

86. A true and correct copy of an email dated June 13, 2006 from Michael Robertson to MP3tunes employees, introduced as an exhibit at the January 26, 2010 deposition of Doug Reese, is attached hereto as Exhibit 85.

87. A true and correct copy of a screen capture of the Sideload Website, introduced as an exhibit at the January 27, 2010 deposition of Doug Reese, is attached hereto as Exhibit 86.

88. A true and correct copy of a print-out of the website located at the URL <http://www.sugarbears.org/slideshow/2005SlideShow/> is attached hereto as Exhibit 87.

89. A true and correct copy of a print-out of the website located at the URL <http://www.filefactory.com/> is attached hereto as Exhibit 88.

90. A true and correct copy of a print-out of the website located at the URL <http://far.olivier.cry.free.fr/> is attached hereto as Exhibit 89.

91. A true and correct copy of a print-out of the website located at the URL <http://www.brotherselectronics.com/> is attached hereto as Exhibit 90.

92. A true and correct copy of a print-out of the website located at the URL <http://web.archive.org/web/20060630023324/http://www.wheatonma.edu/> is attached hereto as Exhibit 91.

93. A true and correct copy of an MP3tunes customer service communication labeled Tcktid 9016 is attached hereto as Exhibit 92.

94. A true and correct copy of an email dated February 22, 2006 from Michael Robertson to MP3tunes and Linspire employees is attached hereto as Exhibit 93.

95. A true and correct copy of an email dated September 25, 2007 from Doug Reese to MP3tunes employees is attached hereto as Exhibit 94.

96. A true and correct copy of an email dated March 14, 2005 from Michael Robertson to Terry Ash and MP3tunes employees is attached hereto as Exhibit 95.

97. A true and correct copy of an MP3tunes customer service communication labeled Tcktid 547 is attached hereto as Exhibit 96.

98. A true and correct copy of an MP3tunes customer service communication labeled Tcktid 9997 is attached hereto as Exhibit 97.

99. A true and correct copy of an email dated April 6, 2006 from Michael Robertson to Doug Reese, introduced as an exhibit at the January 25, 2010 deposition of Doug Reese, is attached hereto as Exhibit 98..

Dated: New York, New York
October 29, 2010


ANDREW H. BART